No. 95-157 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

—vs—

CHRISTOPHER LEE ARMSTRONG, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist African Americans to secure their rights by the prosecution of lawsuits. Its purpose includes rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have

[1]Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

represented parties and have participated as *amicus curiae* in this Court and in the lower state and federal courts.

The Fund has a long-standing concern with the influence of racial discrimination on the criminal justice system. It has raised jury discrimination claims in appeals from criminal convictions,[2] pioneered in the affirmative use of civil actions to end jury discrimination,[3] represented the defendant in *Swain v. Alabama*, 380 U.S. 202 (1965), and filed an *amicus* brief in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Fund has also participated in a number of cases involving the influence of race upon the administration of capital punishment.[4]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties, are its affiliates in the state of California where this action arose.

Since its founding in 1920, the ACLU has been particularly concerned with combatting the problems of racial discrimination in the criminal justice system. For example, the ACLU played an important role in overturning the infamous Scottsboro convictions in *Powell v. Alabama*, 287 U.S. 45 (1932). More importantly, the ACLU has been deeply involved in the effort to eliminate the discriminatory use of peremptory challenges. See e.g. *Batson v. Kentucky*, *supra*.

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[2] *E.g. Alexander v. Louisiana*, 405 U.S. 625 (1972).

[3] *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970).

[4] *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

This case once again brings the issue of racial discrimination in the criminal justice system to the forefront. As this Court has previously recognized, even the appearance of discrimination has a corrosive effect on public confidence in the administration of justice. The actual existence of discrimination is obviously incompatible with our most basic notions of due process and equal protection. The proper resolution of this case is, therefore, of critical importance to the Fund, and to the ACLU and its members.

SUMMARY OF ARGUMENT

The case calls upon the Court to fashion a discovery rule for selective prosecution claims.

Despite the Court's unceasing efforts to purge the administration of justice of racial discrimination, comprehensive contemporaneous studies by the state and federal courts show that racial bias continues to influence decision-making in the criminal justice process. Elimination of bias from judicial proceedings requires that courts take affirmative steps to identify instances in which bias may influence discretionary decision-making and to prevent it from doing so. Information relevant to bias and decision-making must be collected, maintained, and disclosed when necessary to determine whether a decision is bias-influenced. Today, evidence relevant to determining whether decisions of prosecutors are influenced by race is often maintained only by the prosecutor.

These studies as well as other sources show that discretionary decisions by prosecutors in drug prosecutions may sometimes be influenced by racial bias. Courts must be prepared to explore such matters thoroughly whenever a colorable basis for such a claim is presented.

The government's view that discovery is not permissible until the defendant makes a substantial threshold showing of selective prosecution ignores these realities. Such a rule overprotects the government's interest in being free of such discovery, is based upon a false view that

evidence tending to show selective prosecution is generally and reasonably available elsewhere, and would, if adopted, impose a crippling burden of production upon citizens facing criminal charges who are often indigent.

The district court utilized the correct approach in this case. Discovery of non-privileged data and charging criteria was ordered only after respondents presented credible evidence suggesting that only African Americans are prosecuted in federal court for sales of cocaine base whereas large numbers of non-blacks are prosecuted in state court where sentences are significantly lighter, and only after the district court gave careful, deliberate consideration to the government's rebuttal evidence. Such issues are best left to the district courts, and the judge in this case clearly did not abuse her discretion.

ARGUMENT

I. CONTEMPORARY EVIDENCE REVEALS THAT RACIAL BIAS CONTINUES TO INFLUENCE THE EXERCISE OF DISCRETIONARY ACTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE

A. Comprehensive studies initiated by state and federal courts show that racial bias continues to influence decision-making in the criminal justice system

During the past decade, numerous state and federal courts established task forces and charged them with appraising the treatment of racial and ethnic minorities in the courts, ascertaining public perceptions of the fairness of the judicial system, and making recommendations on reforms and identifying the response necessary to eliminate the perception and reality of race-based partiality. The unpleasant and consistent conclusion each has reached is that "inequality, disparate treatment, and injustice remain

hallmarks" of the criminal justice system.[5] We report important findings that are relevant to the question presented.

1. Race continues to influence discretionary decisionmaking within the criminal justice system

After exhaustive research and analysis of copious data[6], the court appointed task forces throughout the country confirmed the continued influence of racial bias at all stages of the criminal justice process. Distressingly, racial bias, both overt and unconscious, continues to cause an alarming number of law enforcement actors -- police, prosecutors, and judges -- to treat minorities differently and more harshly than similarly situated whites. Race continues to exercise influence wherever discretion is exercised, whether it be at the arrest,[7] charging, bail,[8] jury selection,[9]

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[5] *New York State Judicial Commission on Minorities, Executive Summary*, p. 1 (April 1991) [hereinafter "*New York*"].

[6] For a description of each study's methodology, see Appendix A.

[7] The Florida Supreme Court Racial and Ethnic Bias Study Commission's findings are typical. The Commission found that "An overwhelming majority of those interviewed (including, significantly, law enforcement officials) believed that minorities are treated differently from and more harshly than non-minorities at the arrest stage. [M]inority juveniles are more likely to be formally arrested than similarly situated white juveniles." Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice, Dec. 11, 1990*, at 62 [hereinafter *Florida I*]. The New Jersey Supreme Court Task Force on Minority Concerns concluded that there was significant evidence of discrimination by police who channel minority criminal defendants to the court system. New Jersey Supreme Court Task Force on Minority Concerns, *Final Report, June 1992*, at 132 [hereinafter *New Jersey*]; *see also, e.g.*, The Washington State Minority and Justice Commission, *Racial and Ethnic Disparities in the Prosecution of Felony Cases in King County-Final Report, Nov. 1995*, at 52 [hereinafter *Washington*] (deputy prosecuting attorneys

or sentencing stage. One report summarized:

> In short, the reality is that African-American[s] . . . are being treated differently at several stages of the . . . justice system. When the object is punishment -- detention, formal adjudication, or commitment -- minorities get more; when what is being handed out is informal processing or diversion, minorit[ies] get less. This differential treatment results, at least in part, from racial and ethnic bias on the part of enough individual police officers, . . . prosecutors, and judges to make the system operate as if it intended to discriminate against non-whites.[10]

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report that predominantly minority areas are targeted by the police for proactive drug stings); Oregon Supreme Court Task Force, *Report on Racial/Ethnic Issues in the Judicial System, May 1994*, at 3 [hereinafter *Oregon*].

[8]*See, e.g.*, D.C. Circuit Task Force on Gender, Race and Ethnic Bias, *Draft Final Report*, Jan. 1995, at 215 [hereinafter *D.C. Circuit*]; *New York*, at 38-40; Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice, Dec. 11, 1991*, at 23 [hereinafter *Florida II*] ("non-White offenders were less likely than Whites, other factors being equal, to have bail set below schedule boundaries"); *New Jersey*, at 133; Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, *Final Report, Dec. 1989*, at 51 [hereinafter *Michigan*] ("a district judge at a judicial forum indicated that it was sometimes expedient as a matter of political reality to place a higher bond on a minority defendant"); Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially, Aug. 1995*, at 132-136 [hereinafter *Georgia*]; *Oregon*, at 3.

[9]*See Georgia*, at 33; *Michigan*, at 49.

[10]*Florida I*, at 59-60.

The cumulative effect of this differential treatment of non-whites at each level of discretionary decisionmaking has repeatedly been determined to be substantial. *See e.g.*, *Iowa*, at 187 ("the combined effect [of racial bias] during processing in the court system is not slight"); *Florida I*, at 73; *Washington*, at 4-5.

2. Racism, both overt and unconscious, affects discretionary charging and sentencing decisions

In particular, state and federal task forces consistently identified that differences in prosecutorial charging decisions could only be accounted for by race.[11] For example, Michigan's task force found that racial and ethnic minorities in the Detroit metropolitan area are routinely charged with felonies for certain conduct that, when engaged in by white offenders, results in misdemeanor charges. *Michigan*, at 51. Similarly, the Massachusetts Commission reported that available data disclosed a "disturbing pattern": young black males were more likely to receive terms of incarceration than similarly situated white counterparts. Massachusetts Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, *Final Report, Sept. 1994*, at 95 [hereinafter *Massachusetts*].

In New York, Blacks and Hispanics were found to be treated more harshly than whites[12], especially in majority-white counties. For example, in suburban, majority-white Westchester County, minority felony defendants with prior criminal records had a 52% chance of being incarcerated

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[11]*See, e.g.*, State of Iowa Equality in the Courts Task Force, *Final Report, Feb. 1993*, at 174, 179-80, 187 [hereinafter *Iowa*]. *Florida I*, 66-67; *Washington*, at 5, 51.

[12]For example, in misdemeanor cases, whites were assessed fines while Blacks and Hispanics with similar backgrounds were sentenced to jail for similar misdemeanors. *New York*, at 41.

while similarly situated white felony defendants had only a 39% chance of being incarcerated. *New York*, at 41, *citing* New York State Division of Criminal Justice Services study. *See also Washington*, at 54 ("Longer periods of confinement were recommended for Black offenders than for White offenders, even after we took into account legally relevant factors").

This disparate treatment has been acknowledged by prosecutors and judges as well. For example, a federal judge testified to the influence of unconscious racism on discretionary charging and sentencing decisions in the following terms:

> I'm not suggesting deliberate discrimination by the U.S. Attorney, but I have seen throughout my years as a judge a different view brought to cases where a prosecutor may feel there is not something worth saving . . . . I think there is perhaps a natural tendency to think with the white male, "Here's a young person with no prior problems with the law. We don't want to destroy his future." There may not be the same feeling for the black male, just a sense that he is not going to go far anyway. I don't think this is deliberate discrimination, but it results in more of a tendency to find a way out for the white male than the black male.[13]

To similar effect were the observations of a state judge:

> [A]gain, it's this institutional-it's the subtle, it's the unconscious kind of racism. There was an incident that happened in Palm Springs following a sentencing seminar sponsored [by] either CJA or CJER. And judges were in the pool relaxing afterwards, and there was a conversation going on about sentencing and talking about what we had discussed earlier. And among two of the judges, they said, well, they

[13] *D.C. Circuit*, at 165.

> had decided that for Blacks, the sentencing option of jail and longer jail sentences was the more appropriate sentence than for Whites or for Asians, because everybody knew there wasn't any social stigma attached to Blacks going to jail, because, first of all, they live in communities where everybody was Black, and so they didn't have any reason to be embarrassed, so if you just gave a little jail time, it would be all right.[14]

Moreover, a District of Columbia federal prosecutor opined that disparate treatment occurred less innocently:

> I think the judges are less harsh with a white defendant as opposed to a black defendant. A judge will be lenient to a white defendant and when a black man commits the same offense, they will send him away. It is appalling. They may see a white defendant and they connect.[15]

That such bias stems from a government actor's unstated and inarticulable intuition that a defendant deserves different treatment because of his race hardly makes it less of an offense to bedrock equal protection principles.

The task forces' sincere efforts at self-scrutiny have consistently yielded this alarming conclusion: that racial bias in the administration of justice is pervasive and persistent and threatens both the appearance and reality of evenhanded justice.

[14] California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, *1991-1992 Public Hearings*, at 87 (1993).

[15] *D.C. Circuit*, at 162. Another prosecutor told the D.C. Circuit task force, "The judges are predominately a white bunch and they tune into factors that are familiar to them personally." *D.C. Circuit*, at 214.

B. Eliminating racial bias, both overt and unconscious, from judicial proceedings requires that courts take specific steps to identify instances in which bias may influence decision-making and to prevent it from doing so

A second consistent theme of these judicially endorsed reports is also clear: unless courts act more vigilantly, racial bias will never be eradicated from the administration of justice and public confidence will wane further. One task force stated, "[P]ublic confidence in our system of justice must become and remain a priority for each member of that system." *Michigan*, at 23. *See also Massachusetts*, at 4.

Only by acknowledging that bias persists and by taking the necessary steps to deal with it will courts dispel the notion held by some members of the public that the courts are tolerant of race discrimination. Undertaking this challenge is essential because:

> Like any relationship, the relationship between the courts and the communities around them needs attention and care to ensure that each party understands and trusts the other. By giving more attention to these relationships, the courts would not only better serve the community, they would also make their own jobs easier by enhancing the community's confidence in the administration of justice.[16]

1. Despite the courts' current efforts to eradicate racial bias, overt and unconscious racism on the part of law enforcement actors persists

The task forces found that for minorities, overt racism on the part of law enforcement actors is a fact of life.

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[16] *D.C. Circuit*, at 5-6.

An instance of such bias helped to bring about the creation of the Massachusetts Commission: In August 1988, during a criminal session of the Suffolk Superior Court, Assistant Attorney General Thomas H. Brewer, an African American, attempted to gain access to a part of the courtroom that he was entitled to enter. However, because of his race, two court officers mistook the Assistant Attorney General for a defendant and physically attempted to bar him from the courtroom.[17]

Such incidents by law enforcement actors sadly are not uncommon and were reported to other commissions.[18] Additionally, judges continue to exhibit overt racism in the courtroom. The Oregon task force was disturbed by an incident in which a Mexican-American defendant appeared before a judge on the issue of whether the defendant's diversion program should be revoked for nonpayment of diversion fees. In open court, the judge admonished the defendant as follows:

> I'm not going to let him just hold out money. And I know just darn good and well where that money from [his job] went. I'll bet a good part of it went down South, and that's his business, except that he's got this obligation here.

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[17] Doris Wong, *Shannon Office to Probe Alleged Court Assault*, The Boston Globe, Dec. 13, 1988, at 29.

[18] For example, an African-American attorney related his experience to the New York task force:

> In criminal court in New York County I was grabbed from behind in a chokehold around the throat by a court officer who assumed that I was a defendant approaching too close to [a judge] who had motioned me to approach the bench.

New York, at 88.

Oregon, at 1.

That such brazen, on the record comments are exceptional, however, should not blind courts to the extent that unconscious racism based upon racial stereotypes and cultural misunderstandings also permeates the administration of justice. The Georgia task force noted that "there are incidences of bias which appear to result from unintentional conduct or conduct resulting from a lack of awareness." *Georgia*, at 9. *See also*, *Oregon*, at 2.

Indeed, the elusiveness of this subtle or even unconscious racism makes it in one respect more problematic than overt racism: without heightened attentiveness, it is likely to go detected in any individual case. As one report put it, "Like the presence of poison in food or certain pollutants in the air, bias in decision-making may not always be readily detectible by the unwary." *Florida I*, at 5.

Ongoing, unchecked racial bias mocks the idea that justice is dispensed equally to all under the law. Not surprisingly, incidents recounted in the reports explain why too many Americans distrust the fairness of our courts. As this Court has repeatedly acknowledged, racial bias fundamentally undermines the integrity of the criminal justice system in violation of the bedrock guarantee of equal treatment embodied in the Fifth and Fourteenth Amendments. *See e.g. Strauder v. West Virginia*, 100 U.S. 303 (1880); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

While existing mechanisms may be relied upon in cases where race discrimination is overt, the compelling evidence cited above require courts to develop appropriate solutions to reach those circumstances in which racism takes more subtle form. The resolution of such problems "will require an extraordinary intellect, unswerving compassion and most importantly, a level of candor that will engender respect for any decision the Court might reach." *New Jersey*, at ii.

The task forces identified tools to deal with the more subtle bias that has been found to infect discretionary decisionmaking: adoption of systems for collection of relevant data necessary for monitoring discretionary decisions, the promulgation of guidelines to channel the exercise of discretion to avoid bias, and development of new remedies for addressing bias. As the Florida commission found, there is a "need for fundamental reforms to eradicate the stain of racism from the garments of justice." *Florida II*, at viii.

2. Adequate information must be collected, maintained and disclosed when necessary in order to determine the existence or non-occurrence of bias-influenced decisionmaking

During the course of their investigations, the task forces discovered that a major roadblock to determining whether bias existed in the criminal justice system was the difficulty of gathering the necessary data. They were hampered by the lack of systematic institutional mechanisms for compiling bias data and were often forced to conduct their own studies, which usually required considerable financial resources. *See, e.g.*, *Iowa*, at 188; *Florida II*, at 60. Much of the information analyzed by the court task forces came from District Attorneys' Offices.[19]

Since prosecutors' offices already possess access to the information needed to make a comprehensive study of bias, the task forces concluded that these offices should assume the responsibility for gathering much of the

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[19]Law enforcement officers consulted cooperatively with the task forces in a variety of ways, including releasing an array of information about their internal practices. *See Florida II*, at 46; *Massachusetts*, at 93-4 (District Attorneys' offices provided the most useful data on sentencing disparities because their files were the most complete). The cooperation of the prosecutors' offices was essential because relevant information was not always available to the public. *See D.C. Circuit*, at 200.

information crucial to monitoring bias. Data regarding exercise of prosecutorial discretion would then be readily available.[20]

The task forces also recommended that bias data be made routinely available to all concerned, including the public, *see Iowa*, at 190 (any patterns of racially associated disparities should be publicly disseminated, and specifically brought to the attention of the Districts where the disparities occurred); *New York*, at 43 (sentencing statistics concerning the race of the victim, defendant and complainant along with case outcome should be maintained and published by the Unified Court System in cooperation with the New York State Department of Criminal Justice Services), and that periodic studies to determine the existence or influence of racial bias be undertaken. *See Massachusetts*, at 24; *Georgia*, at 165; *New Jersey*, at 133.

3. <u>Based upon the availability of such reliable information, the exercise of discretion can be monitored so as to identify and eliminate discriminatory actions in the criminal justice process</u>

Reliable data must be disclosed when necessary to avoid the influence of bias because "[t]he need for discretion, while compelling, must be balanced against the potential for abuse. The need to ensure that the charging decision is free from racial and ethnic bias must be taken into account." *Oregon*, at 35. *See also Florida I*, at 77. Only

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[20]*See, e.g., Iowa*, at 190 (county attorney offices should keep records of the charges on initial arrest, the charges ultimately filed, the arrests they chose not to prosecute, the reasons they chose not to prosecute, and the race and gender of the alleged perpetrators); *Massachusetts*, at 24, 95 (District Attorney's office should be responsible for collecting data on case processing between the police, the department of probation, and other law enforcement agencies); *Oregon*, at 35 ("District attorneys should be required to collect and report to the Criminal Justice Council data on the variable of race in all charging decisions").

by having data available will it be possible to monitor effectively the influence of bias in the discharge of the official responsibilities of the police, the prosecution and the judiciary. *See Massachusetts*, at 24.

Traditionally, prosecutorial discretion has been regarded not only as broad but as virtually immune from external scrutiny based upon the assumption that adequate internal mechanisms are in place to deal with overt discrimination. Time and again, the task forces concluded that the traditional approach, leaving the exercise of discretion to internal monitoring only, was inadequate to prevent subtle forms of discrimination.

The task forces concluded that new monitoring mechanisms are sorely needed,[21] and that the monitoring of discretionary decisionmaking encourages awareness of racial bias, thereby helping to eradicate it.[22]

The task forces also concluded that traditional remedies for race discrimination are often ineffective. For example, many concluded that trial courts too often fail to police the discriminatory exercise of peremptory challenges by prosecutors. Thus, one task force recommends allowing appellate courts to review *Batson* issues *de novo*. *Georgia*, at 33. Similarly, the Michigan task force expressed alarm after it was unable to find even one reported Michigan decision in which a *Batson* claim was found meritorious. *Michigan*,

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[21]These include promulgating regulations to channel discretion, conditioning funding to prosecutor's offices on the requirement that their offices eliminate the discriminatory effects of their decisions, requiring the submission of reports detailing discretionary practices for review, and creating a state-wide database which includes information about sentencing and charging decisions for outside monitoring. *See Oregon*, at 35, 44; *Georgia*, at 31; *Florida I*, at 66-67, 76; *Florida II*, at 44; *Massachusetts*, at 97; *New York*, at 43; *Iowa*, at 188; *Michigan*, at 55.

[22] *See Florida II*, at 43-44; *Georgia*, at 166-67.

at 49. Thus, it recommended that trial judges be encouraged to implement the *Batson* standard on their own initiative in any jury selection process in which peremptory challenges appear to be racially motivated. *Id. See also New York*, at 59 ("Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly").

II. THE DISCRETIONARY DECISIONS OF FEDERAL PROSECUTORS WHETHER TO EXERT FEDERAL CRIMINAL JURISDICTION OVER NARCOTICS OFFENSES MUST BE SUBJECT TO EFFECTIVE MONITORING TO ENSURE THAT RACIAL BIAS DOES NOT INFLUENCE THEM

Prosecutorial discretion contributes to the widening gulf between juvenile and adult African-Americans' and other offenders' incarceration rates. While "the total number of white juveniles brought to court on drug charges in 1990 exceeded the total number of blacks by 6,300 . . . , a far greater number of white youths were sent home without being tried, were released to drug counseling programs, or were placed on probation. Consequently, 2,200 more blacks than whites ended up on correctional facilities."[23] Figures for adult crack and cocaine

[23]Ron Harris, *Hand of Punishment Falls Heavily on Black Youth*, L.A. Times, August 24, 1993 at 7 [hereinafter *Punishment*]. Other data shows that drug abuse is centered largely in the white community. African-Americans make up 12% of the U.S. population, 13% of all monthly drug users, but represent 35% of those arrested for drug possession, 55% of those convicted of drug possession, and 74% of those sentenced to prison for drug possession. The Sentencing Project, *Young Black Americans and the Criminal Justice System: Five Years Later*, Oct. 1995. *See also* Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America*, 1995, at 49. ("Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs").

prosecutions are similar.[24]

A recent survey of prosecutions for crack cocaine offenses conducted by the Los Angeles Times revealed that not a single white offender had been convicted of a crack cocaine offense in the federal courts serving the Los Angeles metropolitan area since 1986, despite the fact that whites comprise a majority of crack users. Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. Times, May 21, 1995, *quoted in* The Sentencing Project, at 10 (1995). Moreover, according to a study by Richard Berk, between 1990 and 1992, over 200 white crack dealers were prosecuted by the state authorities in Los Angeles, a period during which the U.S. Attorney's office prosecuted not one white defendant for crack. Richard Berk, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sentencing Rep. 36 (1993).

Just as the existence of a pattern of employing peremptory challenges with the result of removing Black or other minority jurors from panels suggests the possibility that this aspect of prosecutorial discretion may be influenced by racial bias, and requires the carefully delineated judicial remedy created by this Court in *Batson*, so too do the data summarized above support -- indeed compel -- the conclusion that a similar judicial remedy must be available to preserve the integrity of the federal criminal justice system. Unless the potential for discriminatory decision-making is addressed, public support for and confidence in federal criminal procedures will be eroded by the suspicion

[24]In 1989, former Drug Czar William Bennett described the typical cocaine user as a "white, male, high school graduate, employed full time and living in a small metropolitan area or suburb." Sam Meddis, *Whites, Not Blacks, At The Core of Drug Crisis*, USA Today, Dec. 20, 1989, at 11A. The Justice Department offered the following profile of crack users in the United States during 1991: 49.9% of crack users are White, 35.9% are Black, and 14.2% are Hispanic. U.S. Department of Justice, Bureau of Justice Statistics, *Drugs, Crime, and the Justice System*, Dec. 1992, at 28.

that drug laws generally, and the "cocaine base" laws specifically, are being administered in a racially discriminatory manner. That is surely the view of a growing number of law enforcement officials[25] and judges[26] who have been on the front lines throughout the "War on Drugs."

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[25] Former Atlanta Police Chief Eldrin Bell remarked recently:

> I wonder if because it is blacks . . . who are going to jail in massive numbers, whether we . . . care as much? If we started to put white America in jail at the same rate that we're putting black America in jail, I wonder whether our collective feelings would be the same, or would we be putting pressure on the president and our elected officials not to lock up America, but to save America?

Nkechi Taifa, *Laying Down the Law, Race by Race*, Legal Times, Oct. 10, 1994, at S36.

Steven Madison, an Assistant U.S. Attorney in Los Angeles, admits that minorities are targeted in crack cocaine arrests and prosecutions. He stated that while crack is sold and used in middle and upper class communities, law enforcement focuses on crack cocaine dealers in minority neighborhoods because, as a result of limited resources, "we went where the brush fires were." Sam Meddis, *supra* n.24, at 11A.

[26] A federal judge remarked recently:

> As sad as it may sound, and as much as the Court feels discomfort in pointing it out, if young white males were being incarcerated at the same rate as young black males, the statute would have been amended long ago.

United States v. Clary, 846 F. Supp. 768, 792 (E.D. Mo. 1994).

III. THE GOVERNMENT'S VIEW THAT DISCOVERY IS NOT PERMISSIBLE UNTIL THE DEFENDANT MAKES A SUBSTANTIAL THRESHOLD SHOWING OF SELECTIVE PROSECUTION, IF ACCEPTED, WOULD IMPOSE AN UNNECESSARY AND CRIPPLING BURDEN UPON VINDICATION OF EQUAL PROTECTION CLAIMS

Despite the swirling controversy surrounding federal drug prosecutions as well as the contemporary evidence that racial bias continues to influence charging decisions yet is difficult to ferret out, the government seeks a rule which, if adopted, would render it immune from any discovery in nearly all selective prosecution cases, regardless of their merit. The Court should reject this approach because it is based upon a false premise that overprotects the prosecution function and would impose an unrealistic and crippling burden of production upon defendants.

A. The "substantial threshold" rule overprotects the government's interest in preserving broad discretionary prosecution powers.

The government asks the Court to hold that "judicial inquiry into a prosecutor's reasons for bringing a prosecution should not even begin unless there is a substantial and concrete basis for suspecting unconstitutional conduct." U.S. Brief at 19. Two justifications are advanced in support: "[b]y requiring a significant threshold showing, courts may avoid unwarranted and highly intrusive inquiries into a prosecutor's judgment . . . [as well as] prevent the needless diversion of government and judicial resources from the adjudication of the criminal case to the disposition of the selective prosecution motion." *Id.* at 20. Neither justifies such a demanding standard.

To acknowledge that the prosecutor enjoys spacious discretion in deciding whom to prosecute is also to recognize that such power "is the power to control and destroy

people's lives."[27] Justice Jackson observed that this broad power of choice held within it the power to abuse "some group of unpopular persons . . . ."[28] Thus, it is the very breadth of such power that creates the potential for unequal treatment.

> The risk of unequal treatment created by standardless discretion is troubling not only as a threat to due process but also in its own right as well. Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community -- racial and ethnic minorities, social outcasts, the poor -- will be treated most harshly.[29]

Prosecutors are clothed with such broad powers for a noble purpose -- to enable them to seek the "equitable objective of individualized justice" within a system of limited resources.[30] But any time the defendant's race enters the calculus, this high purpose is defeated, and the justification for deferential judicial oversight vanishes.

When a citizen makes a colorable showing that race likely influenced the prosecutor's decision to file the pending charge, and claims that she needs access to government files to generate additional proof of invidious discrimination, the Court should require nothing more. Once an honest

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[27] Bennett L. Gershman, *Prosecutorial Misconduct*, at 4-7 (1993)[hereinafter Gershman].

[28] Robert Jackson, *The Federal Prosecutor*, 31 J.Crim.L. & Crim. 3, 5 (1940).

[29] James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 Harv. L. Rev. 1521, 1555 (1981)[hereinafter Vorenberg].

[30] Gershman, at 4-6.

question is raised about the very legitimacy of the proceeding, it is in the government's interest as much as the defendant's to have the issue resolved conclusively by a neutral magistrate based upon *all* relevant information. Requiring the defendant to show more serves no purpose other than to suggest that only citizens who are particularly nimble at detecting bias enjoy a meaningful opportunity to be heard.

B. Such a rule is based upon a false premise: that the evidence supporting such a claim is generally and reasonably available

Even though "the fate of those accused of crime is determined by prosecutors . . . out of public view -- in the hallways of the courthouse, in the prosecutors' offices, or on the telephone,"[31] the government argues that the evidence necessary to demonstrate selective prosecution is generally available from sources other than the government's files. U.S. Br. at 26-27. Thus, it is suggested, the defense is not unfairly burdened by a substantial threshold rule.

This has surely not been our experience, nor that of other respected students of the issue. Former federal prosecutor Gershman has written that "proving improper motivation . . . is extremely difficult, and tends to explain the infrequency with which" selective prosecution claims are advanced.[32] He believes that discovery should follow once "a colorable entitlement or plausible justification" is demonstrated.[33] Former Department of Justice Official Vorenberg agrees:

> . . . the problems involved in proving that a prosecutor had an impermissible motive or personal

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[31] Vorenberg, at 1522.

[32] Gershman, at 4-8.

[33] *Id.* at 4-26.4.

> animus are enormous. Rarely will a prosecutor explicitly signal improper motives. Unless he does, the defendant must try to draw a clear inference of discrimination by comparing his case with those of persons who were not charged, ...[34]

The cases upon which the government relies prove only that in certain unusual circumstances, the defendant may have the ability to present considerable evidence of similarly situated persons who were not prosecuted, as well as some evidence of illicit motive. They hardly make the case for a hard and fast heightened showing in every case. For example, in *United States v. Hoover*, 727 F.2d 387 (5th Cir. 1984), Hoover was one of three of nearly 300 air traffic controllers criminally prosecuted after going out on strike. He was able to show the pool of similarly situated persons easily because they all belonged to the same union and he was their leader. Similarly, in *United States v. Hazel*, 696 F.2d 473 (6th Cir. 1983), the defendant was able to show other similarly situated persons who were not prosecuted because they were members of a tax revolt group to which he belonged.

More often, however, and as in this case, citizens claiming selective prosecution have no special or ready access to the identity of similarly situated persons whom prosecuting authorities chose not to prosecute for similar offenses. And where the basis of the motion is racial discrimination, it is extremely rare for public court files to contain information on the defendant's race. As the task forces found, generation of a data base with the identity of such persons that includes their race and ethnic identity is an enormously time-consuming and expensive proposition when undertaken without the cooperation of the prosecuting attorneys' office. Thus, there is little substance to the

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[34] Vorenberg, at 1542.

government's assurance that a heightened burden would not foreclose the assertions of such claims.[35]

C. The "substantial threshold" standard would impose a crippling burden of production

Indeed, the government's argument bears an uncomfortable resemblance to the supporting pillars of the now discredited rule of *Swain v. Alabama*, 380 U.S. 202 (1965): The government insists that prosecutors are presumed to act in good faith and thus should not be subject even to judicial inquiry into illicit motive in the absence of concrete evidence showing otherwise.[36] Just as unfettered exercise of the peremptory challenge was good for the cause of justice because it gave the government and defense appropriately broad leeway to remove biased jurors who might escape for-cause removal, the government claims similarly broad prosecutorial discretion best assures that limited resources will be used in the most appropriate cases.[37] Courts are ill-equipped, in any event, the argument continues, to review such decisions, and requiring a prosecutor to explain why she is prosecuting a particular case, like having her explain why a peremptory strike was used to eliminate a particular juror, will bring about delay

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[35] In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States advanced a similar argument in support of retention of the rule of *Swain v. Alabama*. See *Batson v. Kentucky*, No. 84-6263, Brief of United States As Amicus Curiae Supporting Affirmance at 26-27)("We also find unpersuasive the argument that *Swain* makes it unduly difficult to demonstrate impermissible use of peremptory challenges even when such abusive practices are actually going on. . . . Moreover, public defender's offices and defense counsel's organizations are well situated to collect the requisite statistics.") As it did in *Batson*, the Court should reject such assurances as unrealistic.

[36] *Swain*, at 222; U.S. Br. at 16, 19.

[37] *Swain*, at 221; U.S. Br. at 17.

and deflect limited resources from the prosecution of law breakers.[38]

If the Court accepts the government's position, and predicates access to even non-privileged information on defendants' making a robust showing, defendants will be denied meaningful judicial determination of their Equal Protection claims unless they can first pull together a credible composite of selective enforcement from other sources, a task that in many cases will require painstaking review of hundreds of court files, consultation with scores of other attorneys, and pursuing other sources sufficient to generate a body of similarly situated persons not prosecuted.

Such a burden significantly exceeds that which the Court determined, in *Batson v. Kentucky*, 476 U.S. 79, 92 n.17 (1986), to be crippling. Justice Powell described such a burden through examples from lower court cases:

> The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. [citation omitted] The court believed this burden to be "most difficult" to meet. In jurisdictions where court records do not reflect the jurors' race and where voir dire proceedings are not transcribed, the burden would be insurmountable. [citation omitted]

We now know that the *Swain* rule was able to shelter for years the intentional discriminatory conduct of certain

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[38] *Swain*, at 221-22; U.S. Br. at 17.

prosecutors.[39] Adoption of a similar standard here would surely generate similar sorry results.

IV. THE DISTRICT COURT'S DISCOVERY ORDER APPROPRIATELY BALANCED EACH PARTY'S LEGITIMATE INTERESTS

The district court ordered discovery in this case only after deliberate and thorough consideration both of the respondent's showing that a significant statistical disparity existed in the race of defendants prosecuted in federal court for crack distribution violations and of the government's explanations for that disparity.

With their motion for discovery, respondents introduced evidence showing a pattern of prosecutions which suggested that race was a significant charging factor. Respondents demonstrated that all 24 crack cocaine cases prosecuted by the government and closed by the Federal Public Defender's Office in 1991 involved black defendants.

At the hearing on the discovery motion, the district judge expressed concern that the "government hasn't offered any explanation at all as to why . . . persons . . .being brought . . . to Federal court for these drug offenses . . . all . . . are black."[40] The judge offered the government an

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[39] *See e.g., Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988)(blacks systematically excluded from petit jury service in Mobile County, Alabama over significant period of time by state peremptory strikes); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991)(blacks systematically excluded from petit jury service in Madison County, Alabama via state peremptory challenges); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991)(blacks systematically excluded from petit jury service in 8 Georgia counties from 1974-81 via peremptory challenge); *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995)(blacks systematically excluded from two Arkansas county petit juries from 1970-75 by state's use of peremptory strikes).

[40] Hearing of Sept. 8, 1992, at 8.

opportunity to provide an explanation. However, at the hearing, the assistant United States Attorney was unable to offer any explanation for the disparity, stating, "I can't explain why the public defender's office has only encountered black defendants [in] crack cocaine cases--I would have no explanation for that."[41]

In the face of the government's complete inability to explain the statistical disparity, the district judge ordered limited discovery, explaining that "what the Court wants to know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria."[42]

To determine the appropriate scope of the discovery order, the Court took into account the government's assertion that one criteria it used for deciding whether to file in federal rather than state court was the existence of a joint federal/state investigation. Government counsel explained that a joint federal/state investigation is initiated when there is use of a firearm in connection with a narcotics trafficking violation.[43] In response to this explanation, the judge directed discovery of four specific non-privileged items: a list of all cases from 1989-1992 in which the government charged both cocaine base offenses and firearms offenses, the race of defendants in each of these cases, whether each case was investigated by federal, state or joint law enforcement authorities, and an explanation of the criteria used by the United States in deciding whether to bring cocaine base cases in federal court.

In its motion for reconsideration of the discovery order, the government offered some of its criteria for prosecuting cases in federal as opposed to state court. As

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[41]*Id*. at 9.

[42]*Id*. 26-27

[43]*Id*. at 20-21.

part of its explanation, the government submitted the declaration of the Chief of the Criminal Complaints Section of the U.S. Attorney's Office which stated that the decision to bring the instant case in federal court was made because the case met the general criteria the government applies to all crack cases. However, the purported general criteria simply described several aspects of the instant case. Counsel for the government later suggested that the official general criteria applied to all crack cases were in fact the same as the criteria present in the instant case.[44]

In response to the government's explanation, respondents argued that a number of the defendants did not satisfy the suggested criteria.[45] Moreover, respondents introduced evidence demonstrating that white crack cocaine dealers exist and are prosecuted in state court only.[46]

After carefully weighing all the evidence, the district judge found the explanations offered by the government

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[44]Government's Motion for Reconsideration, at 24-25; Hearing of Dec. 4, 1992, at 6-8.

[45]Hearing of Dec. 4 1992, at 26

[46]First, the respondents introduced an affidavit of defense attorney Reed, Director of the Criminal Courts Bar Association Indigent Defense Panel. The Indigent Defense Panel handles more state court criminal cases than any other association within Los Angeles County and is composed of over two hundred defense lawyers. Reed attested that as Director of the Indigent Defense Panel, he speaks to many state court judges, prosecutors, and defense attorneys who state that there are many crack cocaine sale cases prosecuted in state court that involve racial groups other than blacks. Hearing of Dec. 4, 1992, at 28-29. Second, defense counsel O'Connor submitted an affidavit stating that she had spoken to Chris Fernandez, the intake coordinator at Impact House in Pasadena, California, who stated that in his experience dealing with the treatment of cocaine base addiction, there are equal numbers of minority and caucasian users and dealers of crack.

inadequate, concluding that the government had failed to make clear the criteria, "if there is any criteria, for bringing this case and others like it in Federal court."[47] Thus, the court affirmed her discovery order.

The district judge's approach to ordering the limited discovery in this case was cautious, careful and reasonable. First, the judge, confronted with unrebutted evidence of a pattern of racial prosecutions, gave the government a full and fair opportunity to offer an explanation. Only after the government was unable to offer a single explanation for the racial disparity did the judge order limited discovery of nonpriviledged relevant information. This order is structured in a way that limits its reach to evidence directly relevant to issues that the government articulated were its criteria for bringing crack cocaine cases in federal as opposed to state court.

The Court should view this order as a sound resolution of this fact-intensive dispute. Because respondents have set forth a colorable showing, and "without discovery, the contention that 'other similarly situated' have not been prosecuted . . . may be impossible to show,"[48] the lower court judgment should be affirmed.

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[47]Hearing of Jan. 5, 1993, at 3.

[48]*United States v. Armstrong*, 48 F.3d 1508, 1521 (9th Cir. 1995)(*en banc*)(Wallace, C.J., concurring).

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

The state and federal court task forces were charged with determining whether racial and ethnic bias still affects the adminisration of justice. It is impossible to capture the thoroughness of the research conducted by each task force and the breadth of their findings and recommendations. However, to lend some context in which to understand the task force reports, below is a brief description of the methodology employed by each state and federal court task force on race and ethnic bias in the courts and excerpts from each study's findings and recommendations. In addition, where the information was available, a brief history of the task force's creation is included.

COMMITTEE ON RACE AND ETHNICITY TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS, DRAFT FINAL REPORT, JAN. 1995

The Task Force was created in 1990 by the D.C. Circuit Judicial Council. The Task Force was created because, while efforts to explore race and ethnicity were underway at the state and local levels, there was growing recognition that these issues merited attention within the federal judicial system as well.

The Task Force interviewed judges on the Circuit to obtain their experiences and observations relating to gender, race, and ethnicity. It interviewed 80% of the trial judges, and 3 appellate judges of the Circuit. Judicial interviews were both anonymous and voluntary. Two appellate judges submitted written comments. The task force also conducted focus groups with practicing attorneys, community representatives, and courthouse personnel.

RECOMMENDATIONS

The Federal Judicial Cer .er, or another appropriate body, should study the results of litigation (such as employment

discrimination cases) that involve issues of race, ethnicity, or gender and that affect a significant number of racial and ethnic minorities, through research controlling for the gender, race or ethnicity of the parties and attorneys in such cases.

FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, DEC. 11, 1990

The Commission was created on December 11, 1989 by the Chief Justice. It was charged with assessing whether race affected the dispensation of justice and with developing longterm strategies to eradicate any vestiges of discrimination.

The Commission developed the findings and recommendations contained in its report after analyzing information from several different sources. First, the Commission held public hearings in every region of the state. Second, the Commission retained leading researchers from Florida's universities and nationally recognized experts to conduct studies and to assist it in formulating the findings and recommendations contained in the report.

FINDINGS:

Extensive evidence suggests that minorities are too often subjected to the threat of abuse and brutality by law enforcement organizations. Survey responses suggest that African-Americans and Hispanic individuals are stopped and detained more frequently than a non-minority would be under similar circumstances and are treated with less respect and more unnecessary force than are their white counterparts.

Minority juveniles are being treated more harshly than non-minority juveniles at almost all stages of the juvenile justice system, including: arrest; referral for formal processing; transfer to the adult criminal justice system; secure detention prior to adjudication; and commitment to traditional state-run facilities.

Opportunities for informal processing and diversion are not equally accessible to minority juveniles. The deeper the penetration of the juvenile justice system towards "deep-end" commitment, the greater the overrepresentation of minority juveniles.

The differential treatment of minority juveniles results, at least in part, from racial and ethnic bias on the part of enough individual police officers, intake workers, prosecutors, and judges, to make the system operate as if it intended to discriminate against minorities. It results as well from bias in institutional policies, structures, and practices.

RECOMMENDATIONS:

Police practices, including field adjustments, relating to law enforcement interaction with juveniles should be recorded for supervisory review and monitoring to determine whether and how race or ethnicity has entered into arrest and disposition decisions by Florida's law enforcement personnel.

The State should mandate the establishment of procedures, in each of the agencies comprising the juvenile justice system, to encourage and provide means for reporting, investigating, and responding to professionals whose decisions appear to have been influenced by racial or ethnic bias.

FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, WHERE THE INJURED FLY FOR JUSTICE: REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA, DEC. 11, 1991

The Legislature, through the joint efforts of the criminal justice and corrections committees of the House and Senate,...should immediately undertake a review of those cases prosecuted under both mandatory minimum statutes and the "habitual offender" statute to determine the effect of race or ethnicity in their selection, processing, or ultimate disposition. To the extent that improper considerations are playing a role, the Legislature should repeal these statutes altogether.

The Florida Legislature should require, as a condition of funding, that each State Attorney: a) promulgate effective criteria which ensure the fair and equal exposure of individuals to processing under mandatory minimum statutes; and b) annually submit a report to the legislative appropriations committees detailing the racial/ethnic composition of all individuals prosecuted under these statutes. To the extent that such reports reveal racial/ethnic disparities in the population of individuals who are prosecuted under these statutes, the Legislature should require a detailed justification for the impact of prosecutorial decision-making in this area.

GEORGIA SUPREME COURT COMMISSION ON RACIAL AND ETHNIC BIAS IN THE COURT SYSTEM, LET JUSTICE BE DONE: EQUALLY, FAIRLY, AND IMPARTIALLY, AUG. 1995

The Commission was created by the Georgia Supreme Court on February 1, 1993. The Commission held six public hearings throughout the state. In addition, the Commission conducted an attitude survey in order to assess

the perceptions of judges, clerks and attorneys practicing in Georgia courts. All judges of the superior, state, juvenile, and probate courts, chief magistrates, and clerks of the superior court were sent surveys in the Fall of 1994. Fifty to sixty percent of each group returned completed questionnaires. The attorney attitude survey was sent to a sample of 2,000 attorneys. Thirty-one percent of the attorneys surveyed responded.

RECOMMENDATIONS

Each circuit should be directed to develop and implement (pending the approval of the Supreme Court) a formal pre-trial release policy, specifying factors used in determining eligibility for bail.

The State has the ability to undertake additional objective testing of the perception of bias in mandatory sentencing. First, a complete and thorough study of the application of [the mandatory sentencing statute] should be conducted, breaking down data for each circuit. In order to achieve this, information of the criminal record of the defendant, the type of representation (private, public defender, or appointed indigent defense), the type of disposition (plea or trial), and the quantity of drugs should be developed, obtained and incorporated into the relevant databases.

The Implementation Committee with the assistance of such agencies as the Georgia Statistical Analysis Bureau (under the auspices of the Criminal Justice Coordinating Council) and the Prosecuting Attorneys' Council, should see that these studies are conducted. Periodic analyses and assessments of other mandatory sentences should be conducted so as to detect potential racial disparity. If such studies do indicate racial bias in the court system, the Implementation Committee should pursue steps to rectify any problems.

[T]he Prosecuting Attorney's Council [should] develop explicit, race-neutral guidelines for use in [mandatory minimum] cases by district attorneys to safeguard against bias.

The Commission feels that the legislature and the courts should consider four alternative recommendations as possible means of addressing this issue [of peremptory challenges]:

> Peremptory strikes could be eliminated in civil and criminal cases.
> De novo appellate review of trial court decisions on *Batson* motions could be provided.
> Trial judges could conduct voir dire using questions submitted in advance in writing by counsel.
> Trial judges could be encouraged to sustain *Batson's* objections when the questioned strike was made for frivolous, "hunch-type" reasons unrelated to the case at bar.

STATE OF IOWA EQUALITY IN THE COURTS TASK FORCE, FINAL REPORT, FEB. 1993

The Supreme Court of Iowa established the Equality in the Courts Task Force on December 4, 1990. The task force held five public hearings throughout the state and received written comments from over 300 people. Additionally, the Task Force contracted the services of the research firm of Selzer Boddy, Inc. to conduct four major studies directed at judges, attorneys, court personnel, and the general public. The Task Force also designated a team of researchers to undertake a special retrospective study of criminal cases to determine the effect of race in the criminal justice process. The perceptions of the general public were elicited via a telephone survey of a cross section of 400

Iowans. Surveys were mailed to 2,114 attorneys across the state, 1600 court employees, and 351 judges. The response rate for the written surveys was high: 84% for judges, 54% for attorneys, and 43% for court employees.

FINDINGS

In each case, there are unexplained differences which are not associated with any known factor but race.

The Task Force believes the uniform use of pretrial release guidelines would decrease the arbitrary or subjective nature of pretrial release decisions.

The Task Force has discovered that information is not easily retrievable throughout the state to permit study of possible race bias in the court system . . . . The benefit derived from the uniform collection of such information from all stages of the criminal process is significant.

The State should maintain a centralized data base that includes information on defendant race, victim race,...along with the range of legal and social variables included in the present study. This would allow periodic monitoring of charging and sentencing discrepancies along racial lines.

The Task Force believes that a collections system data base needs to be established on an ongoing basis to gather the facts necessary to initiate, at any time, an examination and analysis of disparate incarceration rates among adults and juveniles. Otherwise, it will be necessary to conduct expensive and time-consuming criminal case studies; such case studies cannot be done throughout the state efficiently or on an ongoing basis.

RECOMMENDATIONS

The results of the Criminal Case Study should be discussed

at the annual judges conference. The present and future court system database should be monitored periodically, and patterns of racially associated disparities noted, publicly disseminated, and specifically brought to the attention of Districts where disparities occur.

County attorney offices should be required to keep records of the charges on initial arrest, the charges ultimately filed, the arrests they chose not to prosecute, the reasons they chose not to prosecute, and the race and gender of the alleged perpetrators.

MASSACHUSETTS SUPREME JUDICIAL COURT COMMISSION TO STUDY RACIAL AND ETHNIC BIAS IN THE COURTS, FINAL REPORT, SEPT. 1994

The Commission was created on August 2, 1990 by the Justices of the Massachusetts Supreme Judicial Court. The impetus for the Commission's creation was an incident that occurred in Suffolk Superior Court in August 1988. During a criminal session of Suffolk Superior Court, two court officers mistook Assistant Attorney General Thomas H. Brewer, an African American, for a defendant and attempted to bar him, in an inappropriate manner, from gaining access to a part of the courtroom that he was entitled to enter. The resulting publicity highlighted the issue of racial bias in Massachusetts courts. In the Spring of 1990, the Chief Justice, responding to growing public concern, met with bar association leaders to discuss the need for a study. The Commission was formed following the meeting.

The Commission held seven public hearings and focus group meetings across the state to solicit a wide range of public input. The Commission also surveyed the bench and bar members, conducted an extensive research project on the racial composition of jury pools and juries, and examined the effect of bias on sentencing. An attorneys'

survey was sent to 4,542 attorneys. A judges' survey was sent to 328 judges. The response rates were 56% and 80% respectively.

RECOMMENDATIONS

The Supreme Judicial Court should undertake, on its own or through the Massachusetts Sentencing Commission, a comprehensive study of sentencing patterns to determine whether there is any disparity related to racial/ethnic bias. A sentencing study should include a detailed analysis of the sentencing patterns of young male offenders. This analysis should be conducted on serious crimes committed by white, black/African American, Hispanic and Asian American males by comparing the rates of incarceration and sentence length across these groups.

The Trial Court should produce and distribute regular reports of sentencing patterns by race and ethnicity.
The Office of the Commissioner of Probation, the Committee for Public Counsel Services, the District Attorneys' offices, the Trial Court and local police departments should develop coordinated information systems which will allow comparison of the data each has collected. The District Attorney's office for each county should be the primary agency responsible for collecting the data on case processing.

MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, FINAL REPORT, DEC. 1989

The Task Force was created on September 15, 1987 by the Michigan Supreme Court. The Task Force focused its investigations on seven major areas: judicial behavior, court treatment, court employment practices, ethics, attorney

behavior, criminal justice and jury processes. The Michigan Supreme Court Task Force was the first of its kind in the nation.

The Commission was created after the Michigan Supreme Court Citizens' Commission to Improve Michigan Courts called for the creation of task forces on gender and racial/ethnic issues in the courts in 1986. The Citizens' Commission had found that a significant and disturbing perception existed among Michigan citizens: Over one-third believed that individuals were discriminated against in the Michigan court system on the basis of their gender, race or ethnic origin.

The task force held public hearings in eight cities throughout the state. In addition, it surveyed a random sample of 900 attorneys who practiced in the courts. The response rate was 45.6%. It also conducted a survey of 574 judges with an overall response rate of 45%.

FINDINGS

That trial judges should be encouraged to implement the Batson standard on their own initiative in any jury selection process in which peremptory challenges appear to be racially motivated.

RECOMMENDATIONS

The Michigan Supreme Court should conduct a study similar to that done in the felony sentencing project of actual bail practices to investigate the question of disparity in bail practices by race, ethnicity, gender, economic class and region and to establish a process to develop recommendations in the event that disparity is statistically shown.

Current analysis of sentencing should include factors relating

to the impact of and interrelationship of:

a. misdemeanor convictions and sentences
b. race, ethnic background and gender of the judge
c. race, ethnic background and gender of the victim
d. race, ethnic background and gender of the defendant
e. guideline departures

All judges should receive an analysis of their own sentencing practices on an annual basis.

NEW JERSEY SUPREME COURT TASK FORCE ON MINORITY CONCERNS, FINAL REPORT, JUNE 1992

The Task Force was created in September 1985. The purpose of the task force was to critically examine the concerns of minorities with their treatment in the courts and to propose solutions to identified problems. The Task Force was created after Chief Justice Robert Weilentz met with representatives of the Coalition of Minorities in the Judiciary in the summer of 1983. The Coalition was an organization founded in 1980 to address issues of concern to racial minorities in the judiciary and to make recommendations to the Chief Justice, the Supreme Court, and the Administrative Director of the Courts on ways to address problems relating to minority concerns. As a result of the meeting, the Chief Justice convened a Committee on Minority Concerns for the purpose of addressing the concerns of the Coalition. After reviewing the Committee's report, in September 1985, the Task force was created.

The Task Force retained several independent research consultants to execute a wide-ranging research program. The Task Force also met with representatives of bar associations, administrators of key public and private agencies involved with the administration of justice, and conducted telephone surveys. Thirteen public hearings were held at different locations around the state. Written testimony was also taken.

A judicial survey aimed at capturing perceptions of bias in the justice system was undertaken. Of the 340 Superior Court judges attending the Judicial College, nearly 50% returned the questionnaire. The response rate for court administrators attending the Judicial Staff College was 61%.

RECOMMENDATIONS

The Supreme Court should require that all rules and directives regarding bail be reviewed and revised in order to promulgate procedures to be applied uniformly statewide.

The Chief Justice should consider approaching the Attorney General to explore the possibility of jointly sponsoring an empirical analysis of recent New Jersey samples of bail and sentencing outcomes, controlling for key factors that influence the outcomes of these decisions, examining the possibility of cumulative discrimination effects over the sequence of decisions from arrest through sentencing, and determining the degree to which discrimination occurs at each of those decision points.

REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EXECUTIVE SUMMARY, APR. 1991

The Commission was formed on January 21, 1988 by Chief Judge Sol Wachtler. The mandate of the Commission was to examine the courtroom treatment of minorities, review the representation of minorities in nonjudicial positions within the courts, and review the selection processes for judges.

The Commission was created after members of the Coalition of Blacks in the Courts met with the Chief Justice in 1987 to discuss both the despair felt by judges, nonjudicial officers and litigants regarding the treatment of Blacks in the

courts and the underrepresentation of Blacks within the judiciary and the legal profession.

The Commission held four public hearings throughout New York state. Additionally, the Commission held a series of public meetings in each county with a minority population of at least 10%, met with most judges in the state, met with court administrators, and met with leaders of various bar and community associations.

The Commission conducted an attorney survey. Of the 840 attorneys surveyed, 81% responded. The Commission also conducted a survey of the 1,129 judges in the State. The response rate was 57%.

RECOMMENDATIONS

Judges should review their bail and sentencing decisions to ensure that they are fair and not influenced by racial or ethnic stereotypes.

Sentencing statistics concerning the race of victim, defendant and complainant should be maintained along with case outcome and should be published by the Unified Court System in cooperation with the New York State Division of Criminal Justice Services.

Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly in the voir dire process.

The Commission on Judicial Conduct should give complaints of racial bias high priority and keep records of its investigations and disposition of charges in a manner permitting analysis of whether there were any patterns of racial or ethnic discrimination.

OREGON SUPREME COURT TASK FORCE, REPORT ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, MAY 1994

The Oregon Supreme Court Task Force was established by the Oregon Supreme Court on February 21, 1992. The task force was created to identify problems faced by racial and ethnic minorities in the judicial system and to propose a course of action to address the problems and concerns.

The Task Force gathered information from testimony at nine public hearings throughout the state. Additionally, 7,525 persons who use the court system were surveyed regarding issues of race and ethnicity in the Oregon court system. Surveys were sent to 5,438 judges, court personnel, and attorneys. The response rate was 40%. In addition to the extensive survey research, prior research, and written comments submitted to the task force were analyzed.

FINDINGS

Peremptory challenges, eliminating individuals from serving on juries, are used solely because of the race or ethnic background of prospective jurors.

In the criminal justice area, the evidence suggests that, as compared to similarly situated nonminorities:

minorities are more likely to be arrested,
minorities are more likely to be charged,
minorities are less likely to be released on bail,
minorities are more likely to be convicted,
minorities are less likely to be put on probation,
minorities are more likely to be incarcerated.

In the juvenile justice system:

minorities are more likely to be arrested,
minorities are more likely to be charged with delinquent acts,
minorities are more likely to be removed from their

family's care and custody,
minorities are more likely to be remanded for trial as adults,
minorities are more likely to be found guilty of delinquent acts,
minorities are more likely to be incarcerated,
minorities lack experts sensitive to the cultural differences of minorities.

RECOMMENDATIONS

District attorneys should be required to collect and report to the Criminal Justice Council data on the variable of race in all charging decisions.

The legislature should direct the Criminal Justice Council to develop uniform charging standards to be used by all prosecutors in Oregon. The uniform standards should be sufficiently detailed to provide meaningful limits on prosecutorial discretion and to enable judicial review. The Criminal Justice Council should be directed to report biannually to the legislature on the implementation of the standards.

The Chief Justice should require trial judges, in rendering pretrial release decisions, to use uniform forms that include the race of defendants.

The legislature should direct the Criminal Justice Council to study and report the extent to which the race of a defendant affects the outcome of a pretrial release decision, either in the decision whether to release on personal recognizance or in the conditions of release.

Because of the immense help that its statistics have been to this task force, and because it is imperative that such statistics be available in the future, the Criminal Justice

Council should continue to study and report on racial disparities in sentencing.

WASHINGTON STATE MINORITY AND JUSTICE TASK FORCE, SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS, DEC. 19, 1990

The Task Force was established in 1987 pursuant to legislation which sought to improve the treatment of racial and ethnic minorities in Washington courts. The Task Force held public forums around the state in 1988 and undertook research studies.

The Washington Supreme Court created the Minority and Justice Commission in October 1990 in acknowledgment of the importance of the continuing need to determine whether racial, ethnic and cultural bias exists in the state court system and, when it exists, to recommend appropriate action to overcome it. The Commission's purpose was to continue the work of its predecessor, the Task Force, by implementing the Task Force Recommendations.

The data for the Commission's study on race and ethnic disparities in the prosecution of felony cases in King County came from three sources: (1) an automated database used by the Office of the King County Prosecuting Attorney; (2) case files for a sample of approximately 500 felony cases filed with the King County Superior Court during 1994; and (3) personal interviews with 15 King County deputy prosecuting attorneys.

FINDINGS:

The filing of felony charges by the King County Prosecutor's Office varies by the type of offense and by the race of the offender . . . White offenders were the least likely to be charged (60%), compared to 65% of all minority offenders.

First, the effect of race, particularly African American, on bail was significant in most analyses...Second, there were significant differences in the amount of confinement recommended for Black offenders and White offenders, and deputy prosecutors were less likely to recommend an alternative sentence conversion for Black offenders.

[C]ontrolling for legal factors, African Americans tend to receive higher sentences than Whites and are less likely to be provided an alternative sentence conversion.

CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS, FAIRNESS IN THE CALIFORNIA STATE COURTS.

The Advisory Committee on Racial and Ethnic Bias in the State Courts was appointed in 1991 by Chief Justice Malcolm Lucas.

The Committee conducted 13 days of public hearings to ascertain public perceptions of fairness in the judicial system. After the hearings, a survey was completed in order to verify the extent to which the concerns expressed in the public hearings were shared by the general public, attorneys, and court personnel. The survey of the general public consisted of a random sample of 1,338 people. Approximately 2,070 written questionnaires were mailed to all judicial officers and top administrators of the courts. Another 2,000 questionnaires were mailed to minority and non-minority attorneys.